(10)

No. 06-97

FILED
OCT 2 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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OCTOBER 2, 2006

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's rules, Petitioner Stolt-Nielsen Transportation Group Ltd. states that all of its stock is owned by its parent corporation, Petitioner Stolt-Nielsen S.A., a publicly held corporation. Petitioner Stolt-Nielsen S.A. states that it does not have any parent corporation and that no publicly held company owns more than 10% of its stock.

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As established in the petition and the host of *amicus curiae* briefs supporting a writ of certiorari, there are compelling reasons warranting this Court's review of this case. Most critically, the Third Circuit decision creates an irreconcilable circuit conflict on an important constitutional issue under the Separation of Powers. Nothing in the Brief in Opposition detracts from the compelling reasons warranting this Court's review.

First, the petition is not moot in any sense, legal or practical. This Court retains the power to provide effective relief to Stolt-Nielsen and Wingfield, notwithstanding the Antitrust Division's precipitous indictment of them during the pendency of the petition before this Court. Indeed, both sides continue to have definite stakes in the outcome here, the foremost being that reversal in this Court would restore the district court's findings that Stolt-Nielsen and Wingfield did *not* breach the Amnesty Agreement and are entitled to the Agreement's protections. That outcome would promptly relieve Stolt-Nielsen and Wingfield (as well as the district court) of the pending criminal case, as well as other threatened prosecutions.

Second, the Opposition ignores the indisputable point that the Seventh Circuit holds that pre-indictment determinations of alleged breaches of non-prosecution agreements are constitutionally *permissible* while the Third Circuit holds that such determinations are constitutionally *impermissible* as violative of the Separation of Powers. That doctrinal conflict leads inexorably to the conclusion that this case would have had the opposite outcome had it originated in the Seventh Circuit. Indeed, the circuit conflict here is not merely some post-hoc rationale for certiorari: the district court here hinged its injunction expressly on the Seventh Circuit's rule, while the Third Circuit reversed that injunction on the basis of its own contrary rule.

Third, no precedents of this Court or any other court support the Third Circuit's holding that federal courts are powerless to prevent prosecutions that violate constitutional rights.

STATEMENT

The Opposition is at least as notable for what it *does not* dispute as for what it *does* dispute. The Opposition does not dispute that the Antitrust Division has consistently publicized that its Amnesty Program provides complete immunity from criminal prosecution, including indictment. Pet. 2-3. The Opposition does not dispute that the Division purposefully and expressly relinquished its prosecutorial discretion in the Amnesty Program. Pet. 3. The Opposition does not dispute that the Division contractually promised in the Amnesty Agreement "not to bring any criminal prosecution" against Stolt-Nielsen and its directors, officers, and employees. Pet. 4-5. And the Opposition does not dispute that Stolt-Nielsen provided the Antitrust Division with the "smoking gun" evidence that enabled the Division to successfully prosecute the co-conspirators. Pet. 5-6.

Where it does address the facts, the Opposition largely obfuscates them. For example, the Opposition creates the misleading impression that the Antitrust Division began investigating possible collusion well before Stolt-Nielsen contacted the Division about applying for amnesty. Opp. 2. In fact, the district court found, based on the uncontested testimony of the Division's own Deputy Assistant Attorney General, that the Division began its investigation on the very same day that Stolt-Nielsen contacted the Division. Pet. App. 56a (¶ 26). Most critically, however, regardless of when Stolt-Nielsen contacted the Division and when the Division opened its investigation, the Division obviously saw fit to enter into the Amnesty Agreement with Stolt-Nielsen and thus must be bound by its terms.

Furthermore, the Opposition obscures that the Division had ample opportunity to conduct its verification of Stolt-Nielsen's "prompt and effective action" representation — and in fact *did conduct* its own investigation (Pet. App. 57a (¶ 41)) — before accepting the "smoking gun" evidence from Stolt-Nielsen. It was only *after* receiving that "smoking gun" evidence that the Division suddenly and belatedly attempted to revoke Stolt-Nielsen's amnesty on the basis of a supposed misrepresentation.

By stringing together selected excerpts of the Amnesty Agreement, the Opposition also confuses some of the Agreement's crucial provisions. Contrary to the Opposition's suggestion (Opp. 3-4), the Agreement provides that the Division may revoke Stolt-Nielsen's acceptance in the Amnesty Program only if Stolt-Nielsen "has violated" one of the continuing obligations under the Agreement. Nothing in the Agreement suggests that the Division may revoke Stolt-Nielsen's amnesty on the basis of a supposed misrepresentation after the Division had done its verification and after Stolt-Nielsen had performed by incriminating itself and others in the antitrust conspiracy. Finally, nothing in the Agreement suggests that the Division's revocation of amnesty is insulated from judicial review. *See Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (holding that contract's statement of the right of one party to take remedial steps against the other does not constitute a waiver of due-process right to a pre-deprivation hearing unless waiver is clear as well as voluntarily, intelligently, and knowingly made).

The Opposition even obscures the Division's own stated basis for purporting to revoke Stolt-Nielsen's amnesty. Opp. 3-4. The Division has never contended that Stolt-Nielsen, Wingfield, or any other directors, officers, or employees engaged in any collusive activity after entering into the Amnesty Agreement on January 15, 2003. Nor has the

Division ever contended that Stolt-Nielsen, Wingfield, or any other directors, officers, or employees engaged in any collusive activity after Stolt-Nielsen first contacted the Division about applying for amnesty in November 2002. Instead, the Division's stated basis for revoking Stolt-Nielsen's amnesty is that the Division believes the company should have terminated its collusive activity sometime in the first half of 2002 but did not do so until sometime in the second half of 2002. It is on this thin basis that the Division purported to revoke Stolt-Nielsen's and Wingfield's amnesty after Stolt-Nielsen's and Wingfield's dutiful performance under the Agreement.

The cumulative effect of the Opposition's selective presentation of the facts is to obscure what the district court found unequivocally: the Division received the benefit of its bargain under the Amnesty Agreement and had no basis to breach it by prosecuting Stolt-Nielsen or its executives. Pet. App. 49a.

ARGUMENT

I. The Antitrust Division Has Not Mooted The Case By Filing An Indictment During The Pendency Of This Petition.

The Opposition contends that the petition is moot because Stolt-Nielsen and Wingfield have now been indicted. Opp. 6-8. In effect, the Opposition contends that the Antitrust Division has succeeded in avoiding this Court's review by taking — during the pendency of the petition — the very action the petition seeks to avoid. Not surprisingly, this Court has consistently rejected this sort of ploy to evade judicial review. *E.g.*, *Porter v. Lee*, 328 U.S. 246, 251 (1946) (reversing finding of mootness because "[i]t has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be

enjoined the court may by mandatory injunction restore the status quo"); *Jones v. SEC*, 298 U.S. 1, 17-18 (1936) ("after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status . . . ."); *Tex. & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928) ("where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo"); *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 & n.4 (2d Cir. 2005) (applying *Porter*); *FTC v. Weyerhaeuser Co.*, 648 F.2d 739, 741 (D.C. Cir. 1981) (same).

If this Court were to grant a writ of certiorari and reverse, the Court could restore the status quo by quashing the indictment as void *ab initio* and reviving the district court's injunction. Thus, the Antitrust Division's decision to bring an indictment against Stolt-Nielsen and Wingfield while this Court is considering the petition (and, indeed, during the period of an extension granted by the office of the clerk of this Court) does not defeat this Court's ability to review this case. *E.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsel against a finding of mootness."); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992) (reversing dismissal of appeal as moot and holding that a determination of mootness is appropriate only "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

If anything, the Division's decision to bring the pending indictment raises the stakes and makes this case an even more compelling candidate for a writ of certiorari. It is now clear that, in the absence of this Court's review, Stolt-Nielsen and Wingfield will be required to relitigate their entitlement to amnesty under the Agreement. Such relitigation will impose substantial costs upon the parties and the court system, and will introduce the possibility of inconsistent results on the same contested issues between the same parties. At a minimum, it will impose upon Stolt-Nielsen and Wingfield the burden of establishing *twice*, in two separate proceedings, their right to be free from criminal prosecution. On the other hand, if this Court were to grant certiorari and revive the district-court injunction, the relitigation would be avoided.

The Opposition also is incorrect in asserting that the issue raised by the petition is unlikely to recur as to Stolt-Nielsen. Opp. 7. The Amnesty Agreement protects Stolt-Nielsen as well as its directors, officers, and employees (*e.g.*, Pet. App. 68a-70a), and Stolt-Nielsen accordingly sought in this action to enjoin the indictment and prosecution of itself *and* its directors, officers, and employees. Stolt-Nielsen Compl. at 20. The Antitrust Division has sent "target letters" to no fewer than three additional Stolt-Nielsen directors, officers, or employees who have *not* yet been indicted. *E.g.*, Reply App. 1a (redacted). Moreover, in the press release announcing the recent indictment of Stolt-Nielsen, Wingfield, and another Stolt-Nielsen executive, the Division itself emphasized ominously that its investigation was "ongoing." Reply App. 3a, 6a. Thus, the Division's own words confirm that there is at least a "reasonable expectation" that Stolt-Nielsen's bargained-for rights under the Amnesty Agreement will be violated again by the Antitrust Division.

In short, this case continues to present this Court with the opportunity to provide effective relief to Stolt-Nielsen and

Wingfield, and to prevent further indictments in violation of the Amnesty Agreement. The Division has not insulated itself from this Court's review by bringing an indictment before the Court has had a chance to consider the petition.

II. The Seventh Circuit Holds Pre-Indictment Determinations Constitutionally Permissible, While The Third Circuit Holds Such Determinations Constitutionally Impermissible.

Conspicuously, the Opposition never quarrels with the central point in the petition that this case would have had the "opposite outcome" had it originated in the Seventh Circuit: i.e., in contrast to the Third Circuit, the Seventh Circuit would have affirmed the "authority" of the district court to hold a pre-indictment hearing and to enjoin the Antitrust Division. Pet. 19. Thus, the Opposition leaves entirely unanswered — and uncontested — the petition's asserted circuit conflict.

Instead, the Opposition argues that in *Meyer* the Seventh Circuit "made no suggestion of a *requirement* to seek a pre-indictment determination," Opp. 9, thus ignoring that *Meyer* expressly provided: "Absent exigent circumstances, an individual is *entitled* to a judicial determination of his breach *before* being deprived of his interest in the enforcement of an immunity agreement." 157 F.3d at 1076 (emphasis added). In any event, whether a pre-indictment determination is *required* is entirely irrelevant to the circuit conflict at issue.

By focusing solely on whether the Seventh Circuit *requires* pre-indictment determinations — while ignoring that the Seventh Circuit has repeatedly and emphatically endorsed pre-indictment determinations as the "preferred procedure," Pet. 13-16 — the Government misdirects the Court's attention from whether there is a genuine conflict on the "authority" issue.

There is a genuine, irreconcilable conflict because, at a minimum, the Seventh Circuit *permits* pre-indictment determinations, presupposing courts' authority to enforce such determinations, while the Third Circuit categorically *prohibits* pre-indictment determinations as violative of the Separation of Powers. This conflict warrants certiorari review for the reasons stated at Pet. 19-20.

Notably, the petition itself posited clearly and prominently throughout that the circuit conflict turns on whether courts have the "authority" to render pre-indictment determinations (*e.g.*, Pet. 10-11, 12-13, 16, 18-19, 20), not on whether pre-indictment determinations are required. The Opposition simply ignores this "authority" conflict.

Lastly, the circuit conflict is not merely some post-hoc rationale for certiorari: the district court here expressly relied on the Seventh Circuit's rule as the primary authority for the injunction. Pet. App. 45a (district court holding that its "decision is guided by the Seventh Circuit which observed that '[t]he preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment'") (quoting *Meyer*, 157 F.3d at 1077). The Third Circuit based its reversal on its own contrary rule.

III. No Precedents Of This Court Or Any Other Court Support The Third Circuit's Erroneous Rule Of Law.

The Opposition mistakenly asserts that "Petitioners fail to cite any case in which a court has enjoined the federal government from obtaining an indictment against the target of an ongoing federal investigation." Opp. 8. In fact, as discussed in the petition (Pet. 23), in *Hynes* this Court affirmed an injunction against federal prosecution of salmon canners who were "threatened with criminal prosecution . . . ." 337 U.S. at 99.

The Opposition (Opp. 8) cites *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), for the erroneous proposition that federal-court injunctions of prosecutions are authorized only for state prosecutions, not federal. But *Deaver*, which did not address *Hynes*, merely held that the plaintiff in *Deaver* was not entitled to pre-indictment relief because he had *not*, as Stolt-Nielsen and Wingfield have, "alleged the violation of a specific right guaranteed by the Constitution, the legal and practical value of which would be destroyed" unless the threatened prosecution were enjoined. *Deaver*, 822 F.2d at 70 (citation and internal quotation marks omitted).

The Opposition (Opp. 10-11) analogizes this case to *Heike*, where this Court held that a denial of criminal immunity under a now-repealed statute was not immediately appealable as an exception to the final judgment rule. As detailed in the petition (Pet. 18) but ignored by the Opposition, *Heike* (like similar courts of appeals decisions cited in the Opposition, Opp. 11) concerns the interlocutory appealability of a denial of a motion to dismiss an indictment, and has nothing to do with the authority of federal courts to determine the enforceability of a non-prosecution agreement prior to indictment.

Like the Third Circuit, the Opposition (Opp. 12) mistakenly cites *Nixon* and *Cox* for the proposition that prosecutorial discretion is insulated from judicial review. In *Nixon*, this Court held unanimously that the Watergate Special Prosecutor had the authority to subpoena audiotapes and other evidence from the president — despite the president's claim that the matter was an executive "intra-branch dispute." 418 U.S. at 693. *Cox* held that a federal judge could not order a U.S. attorney on pain of contempt to sign indictments returned by a grand jury. 342 F.2d at 169. Neither *Nixon* nor *Cox* has anything to do with non-prosecution agreements or judicial authority to enjoin illegal

prosecutions that would breach a non-prosecution agreement in violation of constitutional rights.

In sum, the Opposition fails to support the Third Circuit's unprecedented holding that federal courts lack the authority to enjoin prosecutions that would breach a non-prosecution agreement in violation of constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2006

REPLY
APPENDIX

APPENDIX A

U.S. Department of Justice

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REPLY TO:
60-483111-0002

March 27, 2006

VIA TELEFAX
(202) 639-9355

George J. Terwilliger, III, Esquire
White & Case LLP
601 Thirteenth Street, N.W.
Washington, DC 20005

Re: [Name Redacted]

Dear Mr. Terwilliger:

I am writing to inform you that [Name Redacted] is regarded as a target of the grand jury investigation being conducted in the Eastern District of Pennsylvania concerning antitrust and other violations in the parcel tanker shipping industry.

Should [Name Redacted] decide to obtain personal counsel, please have counsel contact me directly. If you or

[Name Redacted]'s personal counsel wish to discuss the potential charges against [Name Redacted], please call me at (215) 597-1058 to arrange a meeting.

If he so chooses, [Name Redacted] has the opportunity to appear voluntarily before the grand jury considering this matter under the following conditions: (1) he must waive in writing his Fifth Amendment privilege against self-incrimination, (2) he must consent in writing to undergo a full examination under oath before the grand jury, and (3) he will be subject to a full and complete examination under oath concerning the matters under investigation and anything he says may be used against him.

If I do not hear from you by April 7, 2006, we will assume that you are not interested in discussing this matter further and shall proceed accordingly.

Sincerely,

/s/ Antonia R. Hill
ANTONIA R. HILL
Attorney
Antitrust Division
Philadelphia Office

APPENDIX B

Department of Justice

FOR IMMEDIATE RELEASE AT
WEDNESDAY, SEPTEMBER 6, 2006 (202) 514-2007
WWW.USDOJ.GOV TDD (202) 514-1888

STOLT-NIELSEN S.A. INDICTED ON CUSTOMER ALLOCATION, PRICE FIXING, AND BID RIGGING CHARGES FOR ITS ROLE IN AN INTERNATIONAL PARCEL TANKER SHIPPING CARTEL

Two Subsidiaries and Two Executives also Indicted

WASHINGTON — A federal grand jury in Philadelphia today returned an indictment against London-based Stolt-Nielsen S.A., two of its subsidiaries, and two executives for participating in a conspiracy to allocate customers, fix prices, and rig bids on contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere, the Department of Justice announced. Including today's charges, five companies and five individuals have been charged and fines totaling more than $62.3 million have resulted from the Department's ongoing antitrust investigation of the parcel tanker shipping industry.

Stolt-Nielsen S.A., its subsidiaries--Stolt-Nielsen Transportation Group Ltd. of Liberia and Stolt-Nielsen Transportation Group Ltd. of Bermuda (collectively SNTG)--and U.S. citizen Samuel A. Cooperman and New Zealand citizen Richard B. Wingfield, were charged with the parcel tanker conspiracy today in U.S. District Court in Philadelphia. Cooperman is the former chairman, president and chief executive officer of SNTG. Wingfield is the former

executive vice president and managing director of tanker trading for SNTG. Both of the subsidiaries have had offices in Greenwich, Conn.

"The indictment charges Stolt-Nielsen and its executives with serious antitrust crimes--price fixing, customer allocation, and bid rigging," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "Cracking down on international cartels is the Antitrust Division's top priority and the Division will continue its efforts to aggressively pursue such illegal activity."

Parcel tanker shipping is the transportation of bulk chemicals, edible oils, acids, and other specialty liquids by compartmentalized deep sea vessels. A contract of affreightment is a contract between a customer and a parcel tanker shipping company for the transportation of bulk liquids from port to port.

The alleged conspiracy began at least as early as August 1998 and continued until as late as November 2002. The indictment charges that representatives of Stolt-Nielsen entities and two competitor companies met and agreed not to compete for one another's customers for contracts of affreightment. The defendants are charged with carrying out the secret agreement in a variety of ways, including:

- Refraining from seeking business from one another's customers, or alternatively, when asked to bid by such customers, declining to bid or submitting fraudulent bids with intentionally high prices;
- Discussing customers and prices for contracts of affreightment to avoid competition;
- Preparing, updating, and exchanging customer lists to facilitate implementation of the agreement; and

- Continuing to carry out the conspiracy through meetings and discussions and assuring competitors that the conspiracy remained in effect, even after discovery of certain evidence of the conspiracy by Stolt-Nielsen's then-general counsel.

In March 2004, the Antitrust Division revoked the conditional leniency that had previously been granted to the Stolt-Nielsen entities under the Division's Corporate Leniency Program. Stolt-Nielsen's conditional leniency was predicated on a number of representations made by the company, including a promise that the company "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." The Division revoked the conditional leniency after it learned from other sources that top Stolt-Nielsen executives, including its managing director Wingfield, had continued to meet with competitors and participate in the conspiracy for months after the scheme's discovery by Stolt-Nielsen's then-general counsel, and that Stolt had both withheld and provided false and misleading information about the true extent of the conspiracy.

In February 2004, Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. of Bermuda, and Wingfield filed lawsuits seeking an injunction to prevent the Antitrust Division from indicting them. The U.S. District Court for the Eastern District of Pennsylvania granted the injunction in January 2005. In March 2006, the Court of Appeals for the Third Circuit reversed the District Court decision and, in June 2006, denied petitions for rehearing. Attempts by SNTG and Wingfield to recall and stay the mandate of the Third Circuit failed, and on Aug. 24, 2006, the District Court dissolved the injunction against the Antitrust Division.

"Stolt-Nielsen is the first company to have its conditional leniency revoked since the current program was announced in

1993," said Barnett. "Removing a company from the Corporate Leniency Program is not something the Division takes lightly but regrettably was necessary in this case to maintain the integrity of the program, which requires that those in the program provide full and truthful cooperation."

Each of the defendants is charged with participating in the conspiracy to suppress competition in violation of the Sherman Act. The maximum penalty for the conviction of a Sherman Act violation occurring before June 22, 2004, is three years imprisonment and a fine of $350,000 for individuals and a fine of $10 million for companies. The maximum fines may be increased, however, to twice the gain derived from the crime or twice the loss suffered by the victims if either of those amounts is greater than the Sherman Act maximum fines.

Today's charges result from the Division's ongoing investigation of the parcel tanker shipping industry being conducted by the Philadelphia Field Office, in conjunction with the Philadelphia Office of the Federal Bureau of Investigation.

In the fall of 2003, shipping company Odfjell Seachem AS pleaded guilty to participating in a conspiracy to allocate customers, rig bids, and fix prices in the parcel tanker shipping industry and was sentenced to pay a $42.5 million fine. Two Odfjell executives, Bjorn Sjaastad and Erik Nilsen, also pleaded guilty for their roles in the same conspiracy. Sjaastad was sentenced to four months in prison and a $250,000 fine, and Nilsen was sentenced to three months in prison and a $25,000 fine.

In early 2004, a second company, Jo Tankers B.V., also pleaded guilty to conspiring to eliminate competition on contracts of affreightment in the parcel tanker shipping industry. Jo Tankers was sentenced to pay a fine of $19.5 million, and its former co-managing director, Hendrikus van

Westenbrugge, pleaded guilty and was sentenced to pay a fine of $75,000 and to serve three months in prison.

Anyone with information concerning price fixing or other anticompetitive conduct in the parcel tanker shipping industry should contact the Philadelphia Field Office of the Antitrust Division at 215-597-7405.

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